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EXAMINER	
SHERRER, C	
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BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Paper No. 34

Serial Number: 08/716,223
Filing Date: 11/22/96
Appellant(s): G.A. VAN SCHOUWENBURG

Richard L. Byrne
For Appellant

EXAMINER'S ANSWER

This is in response to Appellant's brief on appeal filed 04/04/01.

(1) Real Party in Interest

A statement identifying the real party in interest is contained in the brief.

(2) Related Appeals and Interferences

A statement identifying the related appeals and interferences which will directly affect or be directly affected by or have a bearing on the decision in the pending appeal is contained in the brief.

(3) *Status of Claims.*

The statement of the status of claims contained in the brief is correct.

(4) *Status of Amendments After Final.*

The Appellant's statement of the status of amendments after final rejection contained in the brief is correct.

(5) Summary of Invention

Appellant's summary of the invention is accurate.

(6) *Issues.*

The Appellant's statement of the issues in the brief is correct.

(7) Grouping of Claims

The rejection of claims 1, 12, 14-16, and 18; claims 3, 19, and 20; claim 9, 10, and 17; and claim 11 stand or fall together because Appellant's brief does not include a statement that this grouping of claims does not stand or fall together and reasons in support thereof. See 37 CFR 1.19

(8) Claims Appealed

The copy of the appealed claims contained in the Appendix to the brief is correct.

(9) Prior Art of Record

The following is a listing of the prior art of record relied upon in the rejection of claims under appeal.

Weiss *et al.*	U.S. Pat. No. 4,772,477	Sep. 1988
Weiner	U.S. Pat. No. 3,740,235	Jun. 1973

(10) Grounds of Rejection

Claim Rejections - 35 USC § 112

Claims 1, 3, 9-12 and 14-20 are rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention.

The claims use the phrases "substantially retain the properties of unprocessed raw meat" and "substantially do not denature" and their scope is unknown.

Claim Rejections - 35 USC § 102

Claims 1, 3, 4, 12, 14-15, and 18-20 are rejected under 35 U.S.C. 102(b) as being anticipated by Weiss et al (U.S. Pat. No. 4,772,477).

Weiss et al teach the production of a meat emulsion product, such as sausage, whereby the meat emulsion is prepared as shown in Example 1-3. Salt is one ingredient. The ingredients, including ground pork and beef, (other than the acid) are combined and mixed thoroughly. An acid, encapsulated citric acid, is then added by blending. The mixed acid/meat emulsion is then placed into casing and held at between 32 to 80 °F. The table, at the top of col. 6, shows that the pH drops from 5.85 to 4.8-4.4.

Claim Rejections - 35 USC § 103

Claims 1, 3, 4, 9-12 and 14-20 are rejected under 35 U.S.C. § 103(a) as being unpatentable over Weiss *et al.* (U.S. Pat. No. 4,772,477)(hereinafter Weiss) in view of Weiner (U.S. Pat. No. 3,740,235).

Weiss teaches that cited above. Weiss does not teach the addition of finely ground and seasoned meat, i.e., forcemeat, as a binding agent. Weiner teach a method of forming a beef loaf. Specifically, chunks of meat are mixed with "relatively finely

ground beef" as a binding agent, salt, and heated to a range of 80-120F, followed by rapid chilling (col. 2, lines 44 to 54).

Weiner teach a method of forming a beef loaf. Specifically, chunks of meat are mixed with "relatively finely ground beef" as a binding agent, salt, and heated to a range of 80-120F, followed by rapid chilling (col. 2, lines 44 to 54). It would have been obvious to those of ordinary skill in the art to use the binding agents of Weiner in conjunction with the process of Weiss et al because combining materials, or additives for their art recognized function and said additives do perform their art recognized function is obvious. *In re Kerkhoven,* 205 U.S.P.Q. 1069; *In re Castner,* 186 U.S.P.Q. 213.

(11) Response to argument

Claim Rejections - 35 USC § 112

Appellant argues that the use of the term "substantially" in the phrases "substantially retain the properties of unprocessed raw meat" and "substantially do not denature" informs those of ordinary skill in the art the scope of their claims and therefore does not make the claims indefinite. They base this assertion on that "the specification is replete with explanations and disclosure of how the proteins on the surfaces of the meat

solubilize and denature to form an adhesive bond between the pieces of meat while the pieces of meat retain their raw nature." (Brief, page 4, bottom). Appellant states that this is an "important aspect of the present invention" and that the "use of the term 'substantially' in claim 1 bears out this feature." (Brief, page 5, top).

These assertions, however, go to enablement rather than clarity of scope. Those in the art are left to ask: how raw? how much denaturation? The specification is silent and provides no answers to these questions.

Claim Rejections - 35 USC § 102

Appellant argues that the Weiss patent fails to disclose "massaging or tumbling." While Appellant admits that Weiss teaches "using a step of 'thorough mixing' of meat product," this step is distinct from the claimed massaging and tumbling. Appellant asserts that Weiss' mixing avoids "smearing between the fat and the meat." Appellant also asserts that the instant invention would cause smearing and somehow a layer of solubilized protein (as claimed) would not occur in the Weiss process and product. The Wijngaards Declaration was submitted to support these assertions.

Said Declaration asserts that no layer of solubilized exuded protein is present in the products of Weiss. Specifically, the Wijngaards Declaration states that the blended salami disclosed by Weiss is "blended evenly and homogeneously to distribute the components" and this "is generally done in the bowl chopper" where the meat is no longer reduced in size and this "mixing is a relatively gentle process . . . ." (¶ 2c.). This process is contrasted with the instant process whereby the meat is massaged and/or tumbled. During this process components are added and "evenly distributed" and the meat is kept intact. (¶¶ 3 and 4). Declarant states that the claimed process produced a meat that "is covered with a clearly visible mass of creamy, paste-like, and very tacky substance." *Id.*

Declarant provides no data to support the distinction. The processes are described in relative terms that do not allow for a firm comparison. It is not seen why the Weiss et al. process would not produce meat pieces that are covered with solubilized proteins. The claims are not directed to any amount of solubilized protein or any holding characteristics of the final product. The Declaration fails to distinguish massaging and/or tumbling from that which occurs in slow chopping. It seems

reasonable that at least tumbling, i.e., the turning over, of the meat would occur.

Again it is noted that Weiss et al do not mention the use of a chopper and Applicant has supplied no evidence that salami, or the other disclosed meats, are conventionally mixed by use of a chopper at slow speeds.

General results of testing salami are given in ¶ 5 but no background procedure is given and it is not even clear if the process is that of Weiss. General characteristics of a commercial product are given without specific methods by which it was produced. These details are necessary to ensure that the claims are commensurate in scope with what is tested.

Appellant was informed that the Office does not have the facilities for examining and comparing Applicant's product with the product of the prior art in order to establish that the product of the prior art does not possess the same material structural and functional characteristics of the claimed product. In the absence of evidence to the contrary, the burden is upon the applicant to prove that the claimed are functionally different than those taught by the prior art and to establish patentable differences. See *In re Best*, 562 F.2d 1252, 195

U.S.P.Q. 430 (CCPA 1977); *Ex parte Gray*, 10 U.S.P.Q.2d 1922, 1923 (BPAI).

With respect to claims 3, 19 and 20, Appellant asserts that the Weiss patent's disclosure of the pH decrease "makes the salami no longer 'substantially' raw." This assertion is opinion in nature and therefore not given any weight.

Claim Rejections - 35 USC § 103

Appellant argues that the secondary Weiner reference does not overcome the deficiencies of the primary Weiss reference because it does not teach the claim limitations as set forth above in the 35 USC § 102(b) rejection. As has been noted above, it is respectfully considered that said limitations are met by the Weiss patent.

Further, Appellant asserts that the references are required to teach the claimed properties (production of solubilized protein layer on the meat). The fact that applicant has recognized another advantage which would flow naturally from following the suggestion of the prior art cannot be the basis for patentability when the differences would otherwise be obvious. See *Ex parte Obiaya*, 227 USPQ 58, 60 (Bd. Pat. App. & Inter. 1985).

For the above reasons, it is believed that the rejections should be sustained.

Respectfully submitted,

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June 15, 2001

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